Is the Tide Shifting on Hunstein?

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McGlinchey's Commercial Law Bulletin is a biweekly update of recent, unique, and impactful cases in state and federal courts in the area of commercial litigation.

Ohio

Restrictive Covenants

New California Woods Homeowners Assn. v. Jakse, 3d Dist. Union No. 14-21-04, 2021-Ohio-3783
In this appeal, the Third Appellate District affirmed the trial court's decision, agreeing that the homeowners had constructive notice of the applicable use restrictions that prevented them from keeping a shed on their property.

The Bullet Point: At issue in this dispute between a homeowners' association ("HOA") and its homeowners was whether the restrictive covenants contained in the HOA's Original Declaration continued to be in effect after the HOA recorded a Restated Declaration and subsequent Amendment. A restrictive covenant is a private agreement that restricts the use or occupancy of real property. Restrictive covenants are often utilized to effect a general plan for a development and are designed to make the development more attractive for residential purposes. To that end, many developments utilize restrictive covenants to specify lot sizes, building lines, architectural styles, and the uses to which the property may be put. Notably, restrictive covenants run with the land and bind subsequent purchasers. When interpreting deed restrictions, Ohio courts apply the same contract construction rules as with any other type of contract. That is to say, Ohio courts interpret deed restrictions so as to carry out the intent of the parties, which is evidenced by the language used in the contract. Here, the Restated Declaration explicitly stated it was recorded to "amend and restate the Original Declaration" in addition to annexing the additional phases. Thus, the Restated Declaration and its subsequent Amendment did not release the areas already subject to the Original Declaration, including the homeowners' property, from the use restrictions but instead restated and amended those existing use restrictions. The homeowners also argued that the use restrictions should not apply to prevent them from keeping a shed on the property as the recorded instruments did not provide adequate notice of said restrictions. To be bound by use restrictions in Ohio, it is not necessary for the purchaser to have actual notice of said restrictions. On the contrary, the purchaser must have either actual or constructive notice. Constructive notice is that which is sufficient to put the purchaser on notice that the restrictions exist. Under long-standing Ohio law, constructive notice of restrictions exists even where a deed generally states that it is "subject to all restrictions of record." As such, if restrictions are recorded in an instrument that is in a purchaser's chain of title, the purchaser is generally deemed to have constructive knowledge of said restrictions.

Sale Proceeds in Tax Foreclosure

Bradley v. Islamic Ctr. of Peace, Inc., 2d Dist. Montgomery No. 29134, 2021-Ohio-3756
In this appeal, the Second Appellate District affirmed the trial court's decision, agreeing that the county treasurer was entitled to sale proceeds under R.C. 5721.19(D) as payment for unpaid taxes owed up through the transfer of the deed, and was not limited to the amount stated in the court's final judgment entry.

The Bullet Point: At issue in this dispute between a county treasurer and a property owner was the entitlement to excess sale proceeds following a tax foreclosure sale. Here, the county treasurer filed a tax foreclosure complaint under R.C. 5721.19 asserting that the property owner had defaulted upon its obligation to pay real estate taxes on five parcels of land. The treasurer obtained judgment and in January 2019, the trial court filed an amended final judgment entry finding the treasurer had the first and best lien for approximately $82,000 in unpaid taxes. The property owner lost on appeal, and the trial court filed a second amended final judgment entry in October 2020. Pursuant to the second amended entry, the parcels were to be sold in the manner prescribed by R.C. 5721.19 for an amount not less than roughly $84,000, which was the $82,000 amount for taxes as stated in the original amended entry plus $2,000 for anticipated costs. The five parcels were sold at sheriff's sale and in April 2021, the treasurer moved the court to confirm the sale, transfer the deed to the purchaser, and distribute the sale proceeds. The property owner filed a motion to recover the excess proceeds, which was subsequently overruled and the proceeds were distributed to the treasurer as partial payment for the unpaid taxes. In this appeal, the property owner argued the treasurer was not entitled to recover any funds in excess of its $82,000 lien as stated in the January 2019 and October 2020 entries. As the court deciphered, the property owner's argument focused on R.C. 5721.19(A), which states that the court shall enter a finding with respect to each parcel of the amount of taxes, assessments, and costs due, and that the parcel may then be sold either at fair market value or the total amount of the finding entered by the court. Essentially, the property owner argued that since the treasurer sold the parcels for no less than $84,000 pursuant to the court's second amended entry instead of the fair market value, the treasurer "waived the right to be paid any more [than this] amount." The court disagreed, noting that there was nothing in the record to suggest the treasurer waived its right to collect all of the taxes due at the time of the foreclosure sale. As the court further noted, there was no dispute the sale proceeds were distributed in the manner prescribed by R.C. 5721.19(D). Per R.C. 5721.19(D), sale proceeds shall be applied first to the costs of the proceeding, second to the delinquent tax and assessment collection fund, and third to the amount due for taxes, assessments, charges, penalties, and interest owed up until the deed is transferred to the purchaser following confirmation of sale. The property owner also attempted to make an equitable estoppel argument, claiming that it relied upon the $84,000 figure in the second amended entry and therefore, the treasurer should be estopped from obtaining proceeds in excess of that amount. As the court explained, any purported reliance on the amount stated in the second amended entry as opposed to the manner of distribution under R.C. 5721.19(D) was unreasonable, as the property owner had at least constructive notice of the treasurer's right under the statute to collect all unpaid taxes due at the time the deed was transferred to the purchaser. Thus, the treasurer was entitled to collect all of the sale proceeds as partial payment for the unpaid taxes owed up until the date the deed was transferred to the purchaser.

Florida

Mail Vendors and the Fair Debt Collection Practices Act

Hunstein v. Preferred Collection and Management Services, Inc., — F.4th —, 2021 WL 4998980 (11th Cir. 2021)

In this appeal, the Eleventh Circuit issued an opinion in April that found a debt collector may violate the Fair Debt Collection Practices Act's (FDCPA) prohibition against communicating with certain third parties in connection with the collection of a debt by using a mailing vendor to print and mail a dunning letter, and also that such a violation supports Article III standing. Now, the Eleventh Circuit has granted rehearing and vacated its prior opinion, issuing a new opinion that reaches the same ultimate conclusions as the prior opinion, but also provides more analysis and contours that highlight limitations in the opinion as well as a strong dissent.

The Bullet Point: The FDCPA generally prohibits debt collectors from communicating to third parties, with limited exceptions, in connection with the collection of a debt absent the prior consent of the consumer. In *Hunstein,* the debt collector utilized a mailing vendor to mail a dunning letter related to a medical debt for Hunstein's minor child. Hunstein alleged that the transmission from the debt collector to the mailing vendor included (1) his status as a debtor, (2) the balance of his debt and the entity to which it was owed, (3) that the debt concerned his minor son's medical treatment, and (4) the name of his minor son. Notably, Hunstein also alleged that the information was communicated to an unspecified number of employees at the mailing vendor, not merely communicated to the mailing vendor. On the merits, the debt collector focused on whether the transmission was "in connection with the collection of any debt," it did not challenge the other elements. In finding that the transmission to the mailing vendor was "in connection with the collection of any debt," the Court distinguished prior opinions finding a demand for payment in the communication is generally required, concluding that the phrase has a different meaning in Section 1692b, the relevant provision in *Hunstein*, than it does in Section 1692e, the relevant provision in the prior opinions.

The more involved portion of the Court's Opinion concerns the issue of Article III standing and whether the plaintiff experienced a concrete injury. The Court explained that there are three ways to satisfy this requirement: (1) allege a tangible harm; (2) allege a "risk of real harm," or (3) allege an intangible-but-nonetheless-concrete injury. The Court quickly rejected the first two options and focused its attention on the third. The violation of a procedural right granted by statute can be sufficient in some circumstances to constitute an injury in fact such that a plaintiff does not need to allege additional harm beyond the one Congress identified. In conducting such an analysis, courts consider history, particularly the relationship of the 'harm ' to a harm traditionally recognized as providing a basis for a lawsuit, and the judgment of Congress. On the former, the Court equated the violation with the common law tort of public disclosure of private facts. The dissent disagreed with the majority's reasoning regarding Article III standing and explained that the Supreme Court's opinion in *TransUnion LLC v. Ramirez* required a different outcome.

McGlinchey will be releasing a more robust analysis of this decision, its limitations, and its implications soon.

Calculating Compensation Under the Fair Labor Standards Act

Hernandez v. Plastipak Packaging, Inc., 2021 U.S. App. LEXIS 30548 (11th Cir. 2021)
The Eleventh Circuit reversed the district court's grant of summary judgment for plaintiff in an action brought under the Fair Labor Standards Act (FLSA). The Eleventh Circuit held that an employer paying its plaintiff bonuses (for a shift premium for night work and for holiday pay) on top of his fixed salary did not preclude the use of the fluctuating workweek method.

The Bullet Point: Under the FLSA, employers must pay non-exempt employees for their overtime hours at a rate not less than one and a half times the regular rate at which they are employed. The issue in this case was whether the employer paying bonuses to its employee in the form of a shift premium for night work and holiday pay, on top of his fixed salary, precluded the use of the fluctuating workweek method. For workers with a fixed salary and variable weekly hours, the employer can use the fluctuating workweek method to determine overtime pay. Under this approach, the employer calculates the employee's regular rate by dividing the weekly salary by the number of hours actually worked. When using this method, an employer need only pay for overtime hours at a rate of one-half times the employee's regular rate. This is because the employee has already been compensated at the straight time regular rate for those hours under the salary arrangement. In *Hernandez*, the Eleventh Circuit ruled that so long as the employee receives a fixed salary covering every hour worked in a week, the payment of a bonus on top of the employee's fixed salary does not bar an employer's use of the fluctuating workweek method to calculate overtime pay.

Disclosure of Expert Witnesses

Callari v. Winkeljohn, — So.3d —, 2021 WL 4978384 (3d DCA 2021)

The Third Circuit reversed a punitive damages award because the trial court limited the testimony of the defendant's expert report after striking an untimely supplemental disclosure. The Third Circuit held that it was error not to consider the Binger factors and whether the plaintiff was prejudiced before striking the supplemental disclosure.

The Bullet Point: The issue of prejudice serves as the primary guide for whether a trial court should permit an untimely disclosed witness to testify or evidence to be introduced. In deciding whether such prejudice exists, the trial court is required to consider certain factors, including (i) the objecting party's ability to cure the prejudice or, similarly, his or her independent knowledge of the existence of the witness; (ii) the intentional or bad faith nature of the calling party's noncompliance with the pretrial order; and (iii) the possible disruption of the orderly and efficient trial of the case. (These are known as the "Binger factors," after the Florida Supreme Court case in which they first appeared.) A failure to consider the Binger factors justifies reversal of the trial court's order.

In this case that arose from a serious automobile accident, the defendant was allegedly under the influence of heroin at the time he caused the accident and the plaintiff sought punitive damages based upon this allegation. The trial court ordered the parties to provide a list of their witnesses and a summary of expected expert testimony. The defendant disclosed an expert witness that would testify about economic damages.

Subsequently, the trial court notified the parties that the trial was scheduled for the week after next, and on that same day, the defendant filed a supplemental expert disclosure that expanded the scope of his expert's testimony to include the impact of a punitive damages award. The plaintiff filed a successful motion to strike the untimely disclosure and the Court limited the expert's testimony to only that which was previously disclosed. Trial ultimately was not set until over a month later but the trial court nonetheless denied the defendant's subsequent motion for reconsideration, concluding that the expert was not needed for the information defendant sought to introduce. The jury entered a verdict in favor of the plaintiff, including a $1 million punitive damage award. However, the Third Circuit reversed the punitive damages award and remanded for a new trial on punitive damages solely because the trial court failed to make findings of prejudice or analyze the Binger factors.

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